STATE OF MICHIGAN

COURT OF APPEALS

GREGORY D. WILLIAMS,

Plaintiff-Appellant,

v

MACKIE AUTOMOTIVE SYSTEMS (DETROIT), INC., TDS LOGISTICS, INC., and TDS AUTOMOTIVE U.S., INC.,[1]

Defendants-Appellees.

UNPUBLISHED
August 16, 2005

No. 252972
Genesee Circuit Court
LC No. 02-074134-NZ

Before: Neff, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants, Mackie Automotive Systems (Detroit), Inc. (Mackie), TDS Logistics, Inc. (TDS Logistics), and TDS Automotive U.S., Inc. (TDS Automotive), on his Whistleblowers' Protection Act (WPA) claim.[2] We reverse and remand.

I. Factual Background and Procedural History

Plaintiff began working for defendants in March of 2000. Plaintiff testified at his deposition that he was initially a union representative and later a union chairman. As part of his duties as a union representative, plaintiff said he filed grievances on behalf of other employees. Plaintiff stated he filed a complaint against defendants with the Michigan Occupational Safety and Health Administration (MIOSHA)[3] in July of 2000. After filing this complaint and bringing

[1] Mackie Automotive (Flint), Mackie Automotive Systems (Jefferson), Mackie Automotive Holdings and Mackie Automotive Services were also defendants before the trial court, but were dismissed from the case and are not parties to this appeal.

[2] MCL 15.361 *et seq.*

[3] While plaintiff was employed with defendants, the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq.*, was administered by the Department of Consumer and Industry Service's Bureau of Safety and Regulation. However, in December of 2003, the Bureau was renamed MIOSHA. For ease of reference, we shall use MIOSHA throughout this opinion.

other safety issues to management's attention, plaintiff said he was asked if he would like to join the safety committee, which he did.

In June of 2001, plaintiff filed a grievance with defendants regarding various safety issues. John Bowen testified at his deposition that, when he, plaintiff and James Scott were talking to Robert Williams, the regional human resources manager, about the grievance,

> [Williams] got mad a[t] us, so mad that his face turned red and he jumped up. We thought he was going to attack us, you know. And he said, "What the F are you trying to do here?" He says, "Are you trying to close this plant or something?" and pushed us right out the door.

James Scott described this same encounter with Williams: ". . . we went upstairs, all of us. And we was having a lot of problems getting things fixed and Greg [plaintiff] told him he called OSHA and told them about it, and that's when he [Williams] said . . . . 'What the fuck did you do that for? You know, all you're going to do is cause a lot of trouble.'" Scott testified that Williams' directed this statement to plaintiff. He further stated that Williams was visibly angry.

Plaintiff stated in his deposition that, on August 3, 2001, he reported another safety incident involving a compactor to the operations manager, Nick Bader. Plaintiff said he later filed a grievance regarding that incident because the supervisor involved had not been disciplined. The grievance, dated August 6, 2001, stated plaintiff would file a complaint with MIOSHA about the compactor incident and other safety issues. On August 8, 2001, plaintiff testified he attended a safety committee meeting before his scheduled shift. Upon the conclusion of this meeting, plaintiff said he told Mitchell Greenwald, the human resources manager, that he had contacted MIOSHA regarding the safety issues.

Plaintiff returned to work later that same day for his scheduled shift. During his shift, plaintiff stated he dropped a tote he was attempting to move with his Hi-Lo. After reporting the incident, plaintiff was told to report to the hospital for drug testing. Plaintiff said he went for testing, but the hospital refused to test him. He also stated that the hospital's therapist told him to report to the company clinic.

Margaret Isbell, a respiratory therapist at the hospital, testified that she asked plaintiff why he was at the hospital and he said he did not know. She also said she asked him if an accident had occurred and he said, "No, nothing happened." Isbell testified that she told plaintiff, "Well, if it's just routine or something, you could go to Premier Health in the morning." Isbell also said she offered to contact plaintiff's employer to clear up the situation, but he refused to wait.

Plaintiff testified in his deposition that he went back to work and told Ken Sigler what happened at the hospital. He stated that Sigler told him to speak to Bader. Plaintiff said Bader told him to return to the hospital to get tested, but he refused because he had already clocked out and had been told to go to the company clinic. Plaintiff said Bader told him three times to return to the hospital, but he refused and requested union representation. Plaintiff stated that he reported to work early on August 9, 2001, in order to report to the clinic, but was suspended. After an investigation, defendants terminated plaintiff's employment on August 21, 2001.

On November 6, 2001, plaintiff filed a complaint alleging he was terminated by defendants in violation of the WPA. On November 3, 2003, defendants filed a motion for summary disposition under MCR 2.116(C)(10). Defendants argued that summary disposition was appropriate because (1) plaintiff failed to establish a prima facie case under the WPA, (2) plaintiff failed to establish that defendants' proffered reason for terminating plaintiff's employment was a pretext, (3) plaintiff's claim was barred by res judicata and (4) plaintiff's claim was barred by collateral estoppel. On November 24, 2003, the trial court heard defendants' motion for summary disposition. After hearing the parties' arguments, the trial court determined that plaintiff had presented a prima facie violation of the WPA and defendants had stated a legitimate business reason for plaintiff's termination. However, the trial court determined that plaintiff had failed to establish that defendants' reason for terminating plaintiff was a mere pretext. The trial court explained,

> The bottom line is that he [plaintiff] refused to go, and so the employer's decision to terminate him for failing to go and get that drug test after they had cleared up everything with the hospital, in this Court's opinion, there is no evidence to support that there was a pretext for his termination on the part of the defendant in this case.
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> And so for that reason I do think it's appropriate under C-10 to grant summary disposition because I don't think there are any questions of material fact. When you look at the evidence in the light most favorable to the nonmoving party . . . its clear that the plaintiff, even by his own testimony, failed to follow the directive of his employer to go back and to be tested after they had cleared this situation up. And so I don't find that there's been a showing of pretext on the part of defendant.

On December 2, 2003, the trial court entered its order granting summary disposition in favor of defendants and plaintiff appealed as of right.

II. Analysis

Plaintiff contends that he presented sufficient evidence from which a jury could conclude that defendants' proffered business reason for terminating his employment was merely a pretext. Therefore, plaintiff argues, the trial court erred when it granted defendants' motion for summary disposition under MCR 2.116(C)(10). We agree.

A. Standard of Review

This Court reviews de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish

> a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Id.* at 120.]

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003), citing *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 609; 566 NW2d 571 (1997); *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996).

B. Plaintiff's WPA Claim

MCL 15.362 provides,

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

Claims made under the WPA are analyzed using the burden-shifting framework used for claims under the Civil Rights Act, MCL 37.2101 *et seq.* *Roulston v Tendercare, Inc*, 239 Mich App 270, 280; 608 NW2d 525 (2000). Under this framework, the plaintiff bears the initial burden of establishing a prima facie violation of the WPA. *Id.* at 280-281. If the plaintiff succeeds, the burden shifts to the defendant to articulate a legitimate business reason for the adverse employment action against the plaintiff. *Id.* at 281. If the defendant produces evidence establishing the existence of a legitimate business reason for the adverse employment action, the plaintiff must be provided an opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the adverse employment action. *Id.*

In the present case, the trial court determined that plaintiff had made out a prima facie WPA case against defendants. The trial court further determined that defendants had articulated a legitimate business reason for terminating plaintiff's employment. These determinations have not been questioned on appeal. Therefore, the only issue before us is whether plaintiff presented sufficient evidence for a jury to find that defendants' stated reason for terminating plaintiff's employment was a pretext.

In *Roulston*, *supra* at 281, the court noted,

> Once the pretext question is reached, the question of mixed motive, i.e., retaliation plus a legitimate business reason, must be considered. *Melchi v Burns Int'l Security Services, Inc*, 597 F Supp 575, 583 (ED Mich, 1984). The *Melchi* court offered four standards for proving pretext in a retaliatory discharge case: (1) whether participation in the protected activity played any part in the discharge, no matter how remote, (2) whether the plaintiff's protected activity was a

> substantial factor in the discharge, (3) whether the plaintiff's protected activity was the principal, but not sole, reason for the discharge, or (4) whether the discharge would have occurred had there been no protected activity.

The court in *Melchi*, *supra* at 583, stated that it believed "that in the context of a claim for retaliatory discharge, a plaintiff retains the ultimate burden of proving that the discharge would not have occurred had there been no protected activity." However, in *Hopkins v Midland*, 158 Mich App 361, 380; 404 NW2d 744 (1987), the court rejected the "but for" test adopted by the *Melchi* court. Instead, the court adopted the test used in Civil Rights Act situations. *Id.* Under this test, "an employee may meet the burden of showing pretext 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Id.*, quoting *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 256; 101 S CT 1089; 67 L Ed 2d 207 (1981). The *Roulston* court reaffirmed that this is the applicable test for proving pretext under the WPA. *Roulston*, *supra* at 281. Hence, plaintiff can prove defendants' proffered legitimate business reason for discharging him was a pretext by offering evidence that defendants were more likely motivated by a retaliatory reason or by showing that the proffered reason is not worthy of credence. Consequently, if plaintiff presented evidence sufficient for a jury to conclude that the proffered reason was a pretext under either method, then the trial court's grant of summary disposition in favor of defendants was inappropriate.

Defendants argue plaintiff failed to establish that his employment was terminated for any reason other than his failure to comply with the substance abuse policy. We disagree.

Paragraph eight of defendants' substance abuse policy states: "The company has established a uniform policy to require the applicant or employee to go immediately and directly to a medical clinic and provide either/ or blood, hair, and urine specimens for laboratory testing for any of the following reasons: . . . e) In cases following an accident or injury involving the employee requiring clinic/hospital visitation, at the Company's discretion." If an employee refuses to be tested, the policy states the refusal will be treated as a positive test result. Finally, if an employee tests positive, the employee will be subject to discipline up to, and including, termination. Thus, under defendants written substance abuse policy the company has discretion to require testing "in cases following an accident or injury involving the employee." Likewise, while the policy does treat a refusal to be tested as if it were a positive result, the policy also states that a positive result will only result in discipline up to termination. It does not make termination mandatory.

Notwithstanding the discretionary language used in the written substance abuse policy, defendants contend the actual application of the policy was far stricter. Bader testified in his deposition that, where a Hi-Lo operator is involved in an accident, the supervisor has no discretion, but rather must send the operator for testing. Indeed Bader stated that any time an

employee misused a piece of equipment, the employee was sent for testing. However, plaintiff presented evidence of at least two occasions where the company did not follow this policy.[4]

On the first occasion, an employee was injured when the tool he was using struck him above the eye. Bowen testified that "they wanted him to go to the clinic and he said no, and they just kind of ignored it and he went home." Bowen stated he could not remember who told the employee to go to the hospital, but that the injured employee refused saying, "The only thing I'm doing, I'm going home." Bowen testified that the injured employee was not disciplined for refusing to go to the hospital. Bader testified that he did not send the injured man to the clinic because he was not misusing the equipment and the injury was not severe enough to require medical treatment. Bader admitted that a drug test form had been filled out for the injured worker, but said it was done before he had had the opportunity to assess the situation. In the second case, Rosa Wiggins dropped some boxes of carpet retainers while operating her Hi-Lo. After the accident, Wiggins said she notified her supervisor and asked him if she should go to the clinic for testing. Wiggins testified that her supervisor told her "Never mind." Defendants find this case inapplicable because Wiggins allegedly told her supervisor about the improperly stacked boxes before she moved them and her supervisor was present during the accident. However, Wiggins testified at her deposition that her supervisor was not present and that she did not notify him until after the accident. Thus, while defendants have presented evidence tending to distinguish these accidents from plaintiff's, taken in the light most favorable to plaintiff, *Maiden*, *supra* at 118, they are evidence that the company did not invariably send employees involved in accidents for drug testing.

In addition to the evidence that the drug testing policy was selectively applied, plaintiff also presented evidence that, when an accident occurred after the clinic had closed for the day, as did his, the Hi-Lo operator was generally not sent to the hospital, but rather was sent to the clinic on the following day. Indeed, Bowen testified in his deposition that, as far as he knew, plaintiff was the only person ever sent to the hospital for a drug test. Finally, Bowen's testimony indicated that at least one worker was not subjected to discipline after refusing to go to clinic and be tested. This evidence directly undermines the credibility of defendants' assertion that they were simply following the dictates of their substance abuse policy.

The evidence indicated that plaintiff had repeatedly filed grievances before his termination, and, in at least one case, reported alleged safety violations to MIOSHA. According to the testimony presented, the grievances and complaints were directed to Greenwald, Williams and Bader. All three of whom were involved in the events leading to plaintiff's termination.[5]

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[4] In his deposition, plaintiff identified other incidents in which he was involved as a union representative, where Hi-Lo drivers either weren't required to get tested or were sent for testing days after the incident.

[5] Bader exercised his discretion in sending plaintiff for the test after the clinic was closed and ordered him to return after the problem with the hospital. Bader testified that Greenwald and Williams investigated these events, but that he (Bader) did not have any involvement with the decision to terminate plaintiff beyond conveying his report of the evenings activities to Greenwald and Williams.

Furthermore, as noted above, plaintiff's past reporting of safety violations to MIOSHA had prompted a significant outburst from Williams. When this outburst is coupled with the timing of plaintiff's termination and the evidence that the substance abuse policy was selectively applied, see *Taylor v Modern Eng Inc*, 252 Mich App 655, 662; 653 NW2d 625 (2002), a jury could reasonably infer that defendants exercised their discretion to send plaintiff for drug testing, to send him to the hospital rather than the clinic, and to terminate him for refusing to return to the hospital, as more likely motivated by anger at plaintiff's engagement in protected activity than by a desire to follow the dictates of their substance abuse policy. Therefore, the trial court erred when it granted summary disposition to defendants.

III. Conclusion

Because plaintiff presented sufficient evidence from which a jury could conclude that defendants' terminated plaintiff's employment based upon his engagement in protected activity rather than their proffered business reason, summary disposition in favor of defendants was inappropriately granted. Consequently, we reverse the trial court's grant of summary disposition in favor of defendants and remand this case for further proceedings not inconsistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Michael J. Talbot